IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,

Appellant,

—v.—

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby respectfully moves pursuant to Rule 42(3) of the Revised Rules of the Supreme Court for leave to file the attached brief *amicus curiae* in support of the Jurisdictional Statement in this case. The written consent of the attorney for the Appellant to the filing of this brief has been obtained, and a copy thereof has been filed with the Clerk of the Court. The consent of the attorney for the Appellee was requested but refused.

A&P is a party to a proceeding presently pending before the State of New York, Department of Agriculture and Markets, in which the same constitutional issue as presented by the instant case has arisen. A&P is seeking

a milk dealer's license to distribute milk from its processing plant in Pennsylvania to five of its own stores in Richmond County, New York. The license application is challenged exclusively on the ground that the issuance of the license would "tend to a destructive competition in a market already adequately served," and a reversal by this Court in the instant case would be dispositive of A&P's application.

The application of A&P was more vigorously contested than the application of the Appellant. While the hearings on the Appellant's application were held on two consecutive days, the hearings on A&P's application required eleven days over the course of seven months. It is believed that the brief which *amicus curiae* is requesting permission to file contains a more complete argument on the interrelationship between New York's procedure with respect to license applications and the commerce clause issue than will the Jurisdictional Statement.

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Question Presented

Whether a license to distribute milk in interstate commerce may be denied consistently with the Commerce Clause of the United States Constitution on the basis that "the issuance of the license will tend to a destructive competition in a market already adequately served?"

Statement of the Case

To avoid repetition, we adopt the Statement of the Case set forth in the Jurisdictional Statement. We also note:

(i) in the enforcement of the "destructive competition" provision ("destructive competition ground") of § 258-c of the New York Agriculture and Markets Law (McKinney 1972 and Supp. 1977-78) ("§ 258-c"), many prospective licensees, of which The Great Atlantic & Pacific Tea Company, Inc. ("A&P") is one,* have suffered even more protracted and burdensome hearings than did Appellant in the present case, and

(ii) for every Tuscan Dairy Farms, Inc. ("Tuscan") or A&P who seeks a license, there are numerous other potential out-of-state licensees who may be discouraged from even filing an application (or proceeding once it is filed) by the prospect of a hearing as lengthy and expensive as that experienced by A&P, with a potential outcome as fruitless as that experienced by Tuscan.

* A&P is seeking to service its own stores in Richmond County with milk and dairy products from its Fort Washington, Pennsylvania processing plant. Hearings have been concluded but no decision has been issued by the Hearing Officer.

THE QUESTION IS SUBSTANTIAL

I.

The Opinion of the New York Court of Appeals Is Flatly Inconsistent With Opinions of this Court.

A. Analysis Of The Opinion Below

In 1949, this Court, in effect, decided the present case when it decided *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949). The Appellee there, as in the present case, was the Commissioner of Agriculture and Markets in New York.

The relevant statutory provision in the present case, the destructive competition ground of § 258-c, was in pertinent part the statute in *Hood*. The action taken in each case was denial of a milk dealer's license on the destructive competition ground. The only arguable distinction between the present case and *Hood* is that Tuscan is seeking to import milk into New York, whereas the applicant in *Hood* was seeking to export milk from New York. This is a distinction without a difference—the *Hood* opinion relied extensively upon *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in which certain restrictions upon import of milk into New York were held unconstitutional under the Commerce Clause, and the *Hood* court expressly noted that it was immaterial whether restrictions affected import or export. 336 U.S. at 531, 535. In the present case, therefore, as in *Hood*, this Court should reverse the New York Court of Appeals' affirmance of the denial of the license.

Hood and *Baldwin* are dispositive of the present case. Last term this Court cited *Hood* as follows:

> "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity

has been erected. See, *e.g., Hood & Sons* v. *Du Mond* . . . ." *City of Philadelphia* v. *New Jersey,* 98 S.Ct. 2531, 2535 (1978).

As noted even by the Court of Appeals in the opinion below, *see* 45 N.Y.2d at 224-26, under the decisions of this Court, *if* a legitimate local interest is found, then a balancing test is applied. *See City of Philadelphia* v. *New Jersey, supra,* 98 S.Ct. at 2535. Therefore, the threshold question, which we submit is dispositive in this case, is whether the destructive competition ground of § 258-c effectuates a legitimate local interest or "simple economic protectionism." *Id.*

The destructive competition ground serves simple economic protectionism. The text of the statute, specifically the word "competition", addresses an economic phenomenon. The Court of Appeals below attempted to avoid this obvious problem by arguing that the destructive competition ground is merely a means to a purportedly legitimate end, specifically, "maintenance of a balanced milk distribution structure for the protection of the consumer-public." The Court of Appeals emphasized that a balanced milk distribution structure was valuable "particularly" because it "provides 'service on retail home delivery routes and service to small volume wholesale customers' . . . which . . . serve consumer needs not met by supermarkets and warehouse-type outlets." 45 N.Y. 2d at 225-26. Thus, the interest which the destructive competition ground, as interpreted by the Court of Appeals, protects, apparently is continued service to some of the outlets patronized by people who buy milk but do not, or do not always, buy it at supermarkets. In short, the statute applies where the commissioner determines that, if a license is issued, certain consumers may not be able to obtain milk as conveniently as at present. At this point, the opinion of the Court of Appeals below squarely conflicts with opinions of this Court.

This Court held in *Baldwin* that the goal of maintaining a supply of milk to consumers may *not* permissibly be invoked to justify economic protectionism which burdens interstate commerce:

> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. *The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk;* the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Nebbia v. New York, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. . . .
>
> "We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk shed may be a means of assuring to *consumers* a steady supply of a food of prime necessity." (emphasis supplied) *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522-23 (1935)

This passage is dispositive of the argument of the Court of Appeals. It unequivocally holds that assurance of local supplies to *consumers* is not a "legitimate local interest" upon which to justify economic protectionism which burdens interstate commerce.

The Court of Appeals in its opinion below stated, "One looks in vain in *Hood* for any translation of economic disadvantage to dealers into injury to consumers." 45 N.Y. 2d at 229. This Court in *Hood*, however, explicitly rejected the argument that assurance of supplies to consumers constitutes an excuse for burdening interstate commerce. In discussing *Baldwin*, the *Hood* opinion alluded to the above quoted passage from that case:

> "In neither [*Baldwin* nor the present, *i.e.*, *Hood*] case is the measure supported by health or safety considerations but solely by protection of local economic interests, *such as supply for local consumption* and limitation of competition." (emphasis supplied) *H.P. Hood & Sons, Inc.* v. *Du Mond, supra*, 336 U.S. at 531.

We respectfully suggest that the word "consumption" in the above quote is derived from the same root as "consumer", *i.e.*, "consume", and that the New York Court of Appeals therefore was in error when it argued that *Hood* does not "mention or address the subject of consequences to consumers or consumer protection." 45 N.Y. 2d at 229-30.

The opinion of the Court of Appeals below discusses the absence of evidence in the record which tends to show discrimination against applications for licenses to ship milk in interstate commerce as opposed to intrastate commerce. *See* 45 N.Y. 2d at 226-28. As noted above, *supra*, pp. 3-4, where only protection of economic interests is served, legislation burdening interstate commerce is virtually *per se* unconstitutional, irrespective of "balancing" or "even-handedness". Further, the "non-discrimination" defense was explicitly rejected in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951), where this Court held an ordinance unconstitutional under the interstate commerce clause despite the absence of discrimination:

> "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n. 4.

Finally, "evenhandedness" was also deemed irrelevant in *Hood* because apparently there was no proof that the Commissioner discriminated in his application of the destructive competition ground against interstate commerce. The relevant comparison in *Hood*, we submit, was between license applications seeking to (a) ship milk from Greenwich, New York (where the applicant proposed to build its plant) to other states and (b) ship milk from Greenwich, New York to areas in New York; this Court in *Hood* did not discuss facts pertaining to this comparison, and the dissenting opinions indicate that the record in that case was bereft of facts bearing upon this comparison or upon the effects of destructive competition ground upon interstate commerce. 336 U.S. at 547-49 (Black), 573-74 (Frankfurter).

B. This Court Should Hold The Destructive Competition Ground Unconstitutional On Its Face

While a summary reversal on the authority of *Hood* and *Baldwin* would seem appropriate in the present case, an opinion holding the destructive competition ground unconstitutional on its face would be advisable so that the New York courts cannot conjure up new spurious distinctions of *Hood* and *Baldwin*.

The interpretation by the New York Court of Appeals of the destructive competition ground to promote a "balanced milk distribution structure" appears to be a shift in emphasis from prior law, which shift presumably was designed to confuse the Commerce Clause issue as much as possible. For example, in another recent decision, the

Court of Appeals emphasized protection from competitive injury as the purpose of the destructive ground in holding that competitors of a new licensee have standing to obtain judicial review of the Commission's determination to issue the license. *Dairylea Coop., Inc.* v. *Walkley*, 38 N.Y.2d 6, 11, 339 N.E.2d 865, 868, 377 N.Y.S.2d 451, 455-56 (1975).

The destructive competition ground usually has been interpreted so that denials of license applications were confirmed where there existed excess capacity among extant competitors because, said the courts, under such circumstances the issuance of the license would be financially deleterious to such competitors. For example, a denial of a license was confirmed on the following basis:

> "In the situation here presented, the additional competition resulting from the establishment of a new plant would necessarily tend to a destructive effect, within the meaning of the statute. As the commissioner pointed out in his findings, the new plant would divert milk from existing plants, which were already operating below their capacity, and thus would necessarily result in an increase of their unit cost of operation and would tend to undermine their stability and their ability to continue to operate upon a profitable basis." *Friendship Dairies, Inc.* v. *Du Mond*, 284 App.Div. 147, 154, 131 N.Y.S.2d 51, 57 (3d Dep't 1954).*

* *See also Perky Milk Corp.* v. *Wickham*, 15 App.Div.2d 624, 625, 222 N.Y.S.2d 612 (3d Dep't 1961); *Kotcher* v. *Carey*, 3 App.Div.2d 957, 958, 162 N.Y.S.2d 708, 709-10 (3d Dep't), *appeal dismissed*, 3 N.Y.2d 879, 145 N.E.2d 180, 166 N.Y.S.2d 503 (1957); *Ginsburg* v. *Carey*, 2 App.Div.2d 733, 152 N.Y.S.2d 856, *reargument denied*, 2 App.Div.2d 824, 154 N.Y.S.2d 1017 (3d Dep't 1956); *Grimsteed* v. *Carey*, 1 App.Div.2d 985, 986, 150 N.Y.S.2d 657, 658-59 (3d Dep't 1956); *cf. Dusinberre* v. *Noyes*, 284 N.Y. 304, 31 N.E.2d 34 (1940); *but cf. Dairymen's Coop. Ass'n* v. *Du Mond*, 282 App.Div. 69, 74, 121 N.Y.S.2d 857, 863 (3d Dep't), *appeal dismissed*, 306 N.Y. 595, 115 N.E.2d 825 (1953).

As a consequence, extant competitors have been able to expand their capacity to meet all demand by the simple expedient of maintaining some excess capacity to prevent putative new entrants from obtaining licenses.* *Cf. United States* v. *Aluminum Company of America*, 148 F.2d 416, 430-31 (2d Cir. 1945). This also provides an umbrella for inefficiency, as there is no actual or potential competition from more efficient companies not licensed to service Richmond County.

To hold the destructive competition ground unconstitutional on its face would entail little more than a reaffirmation of the holding in *Baldwin* that protection of local economic interests cannot be justified on some legitimate pretext:

> "There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. . . . Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." *Baldwin* v. *G.A.F. Seelig, Inc., supra*, 294 U.S. at 523-24.

We submit that the relationship between the destructive competition ground and any legitimate interest is too remote to justify obstructions to interstate commerce.

* Extensive hearings on A&P's application disclosed that three of the five processors who actually serviced Richmond County had expanded their capacity within the two or three years prior to the hearing, one (Dellwood Foods, Inc.) by approximately 100% (Dellwood, A&P Tr.II-75-76; Dairylea Coop., Inc., A&P Tr.I-105-09; Queens Farms Dairy, Inc., A&P Tr.I-114-16, 121). A fourth processor (Honeywell Farms, Inc.) had recently modernized its plant (A&P Tr.I-196-97). The fifth processor did not testify.

II.

Even Were License Applications Granted Routinely, New York's Licensing Procedure Impermissibly Burdens Interstate Commerce to Further Local Economic Interests.

This case also merits a hearing by this Court because New York has adopted a licensing procedure which is so forbidding that most prospective licensees would be foolish to apply and so lengthy that the preclusion of distribution during the pendency of the application itself is unconstitutional. Obviously, if this Court holds that licenses to distribute milk in interstate commerce cannot be denied on the destructive competition ground, New York will no longer be able to hold hearings on applications therefor on this pretext.

The New York Department of Agriculture and Markets has promulgated "Milk Dealer Licensing Policy and Procedures." These procedures provide that, in virtually any case, if any prospective competitor of an applicant objects that the issuance of the license would tend to a destructive competition, a hearing must be held:

> "[Except in certain limited instances,] no application for a milk dealer's license or extension thereto will be granted until considered at a public hearing if any milk dealer licensed for the county, counties or an area therein submits in writing within the period established pursuant to paragraph (c) above a substantive reason or objection (i.e., it would lead to destructive competition in an area adequately served; it is against the public interest or the license or extension should not be granted by reason of the applicant's character, experience or financial responsibility) to issuance of such license or extension."

As discussed above, *supra*, pp. 7-9, the New York courts interpret the destructive competition ground to protect extant competitors; in order to force a hearing, therefore, prospective competitors essentially need only to allege that the grant of the license would be detrimental to their business.*

The hearings can be burdensome. A&P, like Tuscan, applied for a license to service Richmond County. Specifically, A&P is seeking to service its own five retail stores in Richmond County from its own milk processing plant in Fort Washington, Pennsylvania. A&P's application was more vigorously opposed than Tuscan's. Hearings on A&P's application covered eleven days spread over seven months, with sessions in New York City and Albany. During the first three days, the Department produced six witnesses, two of whom were expert witnesses, and A&P's present supplier produced an additional witness.** Thereafter, A&P produced one factual and one expert witness.*** The Department responded with four days of expert testimony. The Department, which purports to be neutral, vigorously opposed A&P's application at the hearing, even to the extent of introducing exhibits which Professor Stephen G. Breyer of Harvard Law School, A&P's

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* A&P's application is being challenged principally by its present supplier, who fears not even competition, but simply loss of A&P's business. This supplier holds 50.9% of the Richmond distributors' market, and its dairy processor (Honeywell Farms) supplies 59.3% of that market. (A&P Post-Hearing Memorandum, tables 2 and 3).

** The dairymen's drivers' union also produced a witness, who testified in opposition to the application.

*** A lawyer representing A&P also testified with respect to preparation of certain exhibits.

expert witness, characterized under oath as "terribly misleading, extremely misleading" and "not just misleading, but seriously misleading" (A&P Tr. X-25, 28). This hearing, obviously, required representation by counsel and was very expensive for A&P (and the taxpayers of New York). Such hearings may deter a large class of prospective suppliers* even from submitting or thereafter pursuing license applications.**

Prospective licensees are precluded from distribution of milk during the pendency of the hearings. New York Agriculture and Markets Law § 257 (McKinney 1972 & Supp. 1977-78). The hearing procedure is lengthy. Tuscan filed its application on May 28, 1975.*** The hearing was held on July 15 and 16, 1975, and the adverse decision rendered by the Commissioner on May 3, 1976, almost a year after the filing of the application. A&P filed its application, also to serve Richmond County, on December 13, 1976. The hearing commenced, almost a year later, on November 15, 1977 (dates scheduled in September and October were unacceptable to A&P or the Commission). The hearing concluded on June 7, 1978 and, if Tuscan's experience is any guide, the application will be well into its third year before a determination is rendered.

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* Depending upon the size of the facility, milk processing plants up to 250 miles from a market center may economically service that market. A.C. Manchester, "Market Structure, Institutions, and Performance in the Fluid Milk Industry," U.S. Department of Agriculture, Economic Research Service, Agricultural Economic Report No. 248, pp. 7-9 (1974).

** The Department's statistical information shows that applications to distribute milk at wholesale are several times more likely to be denied than any other category of applications and, further, that a large percentage of such license applications either are withdrawn or remain pending for long periods. (A&P Exhibit 41).

*** Tuscan applied to service the other four counties of New York City as well as Richmond, but agreed to postpone the hearings with respect to such other counties. This may be an example of the chilling effects of the prospect of having to suffer a hearing.

Even if a favorable determination is rendered, a competitor may obtain judicial review of the determination. *Dairylea Coop., Inc.* v. *Walkley*, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975). If an adverse determination is rendered, a review proceeding is available in the New York Appellate Division (Third Department). Tuscan's experience indicates that such review is not speedy. Tuscan's adverse decision was rendered by the Commissioner on May 3, 1976; the decision of the Appellate Division affirming the Commissioner was rendered over a year later on August 4, 1977.

Licenses are valid only for one county. If A&P obtains the license it is seeking, it will be able to service its five stores in Richmond County.* A&P will not be able to service even one of its other stores in New York State unless and until it undergoes, from scratch, a similar hearing, and receives a favorable final determination, with respect to each county in which stores sought to be serviced are located.**

In sum, if any prospective competitor in any county sought to be serviced fears that the distribution of fluid milk in interstate commerce will hurt his sales or profits, *i.e.*, his economic interests, he can cause a hearing to be held which (i) will inconvenience the prospective licensee, perhaps discourage pursuit of the license and may result

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* Between the time it filed its application and prior to the conclusion of hearings, A&P closed its sixth store in this area.

** The only ground upon which the A&P hearing was held was the destructive competition ground, *i.e.*, sanitation, moral character and the like were not challenged. Since, under the Department's present regulations, destructive competition is determined on a county-by-county basis, *see* New York Agriculture and Markets Law § 253(5) (McKinney 1972), 1(A) N.Y.C.R.R. § 27.1, a favorable ruling with respect to one county on the destructive competition ground is of no precedential value with respect to any other county.

in denial of the license, and (ii) in any event, will delay the entry of the applicant for perhaps two, three or more years. Each of these consequences constitutes an impermissible burden upon interstate commerce. If this Court holds unconstitutional the destructive competition ground, the principal* pretext for this hearing procedure will be removed.

CONCLUSION

The question presented by this appeal is substantial, and we urge this Court to note probable jurisdiction.

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* Such hearings could also be held on various other issues under § 258-e (McKinney 1972 & Supp. 1977-78), *e.g.*, the applicant's financial responsibility, but (i) such hearings would not be held on a county-by-county basis, *see supra*, p. 13 n.**, and presumably would be relatively few in number and brief in duration, and (ii) the standing of prospective competitors to participate in such hearings and seek review of issuances of licenses would be in doubt. *Cf. Dairylea Coop., Inc.* v. *Walkley, supra.*